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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-456

NORTH AMERICAN ACCEPTANCE CORPORATION SECURITIES CASES

ARNALL, GOLDEN & GREGORY and TOUCHE ROSS & CO.,
Petitioners,

v.

SMITH, COHEN, RINGEL, KOHLER & MARTIN and BARTHOLD & McGUIRE,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION .. 5

(1) There Is No Conflict Among The Circuits On The Question Presented 5

(2) The Fifth Circuit's Decision Is Not In Conflict With *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); Rather It Is In Accord With *Cohen* And Is A Correct Decision ... 10

CONCLUSION 14

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES:

Allegaert v. Perot, 565 F.2d 246, (2nd Cir. 1975) 9

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 6, 8, 9, 10, 13

Community Broadcasting of Boston, Inc. v. F.C.C., 546 F.2d 1022 (D.C. Cir. 1976) 9, 12

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) ..... *passim*

Cullen v. New York State Civil Service Commission, 566 F.2d 846 (2d Cir. 1977) 8

General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) 7, 8

Guerine v. J&W Investment, Inc., 544 F.2d 863 (5th Cir. 1977) 11

Handwerger v. Ginsberg, 519 F.2d 1339 (2nd Cir. 1975) 8

Kramer v. Scientific Control Corp., 534 F.2d 1085 (3rd Cir.), *cert. denied*, 439 U.S. 830 (1976) 9

Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) 7, 12

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) ... 7

Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) 7

Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) 12

W. T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976) 8

Zylstra v. Safeway Stores, Inc., 578 F.2d 102 (5th Cir. 1978) 12

STATUTES:

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 1292(b) 4, 12, 13

28 U.S.C. § 1651 ..... 12, 13

OTHER AUTHORITIES:

The Appealability of Orders Denying Motions for Disqualification of Counsel in Federal Courts, 45 U. Chi. L. Rev. 450 (1978) 12

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Respondents Smith, Cohen, Ringel, Kohler & Martin and Barthold & McGuire respectfully pray that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 20, 1979 be denied.

QUESTION PRESENTED

Whether a District Court's refusal to disqualify counsel for the plaintiff class in a securities class action for an alleged "appearance of impropriety" not affecting the moving defendants is appealable of right under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Petitioners are defendants in a complex securities class action arising out of the collapse of North American Acceptance Corporation ("North American"). Arnall, Golden & Gregory ("Arnall, Golden") were general counsel to North American, and Touche Ross & Co. ("Touche Ross") were outside auditors to North American, and are the Petitioners here. In 1978, Petitioners moved in the District Court to disqualify the two respondent law firms from representing the plaintiff class, based on an extraneous attorney-client relationship between one of the respondent firms, Smith, Cohen, Ringel, Kohler & Martin ("Smith, Cohen"), and the First National Bank of Atlanta ("First National"), another defendant.[1] Petitioners claimed that this relationship created an appearance of impropriety in violation of the Canons of Ethics.

The disqualification motions were triggered by a settlement proposal, negotiated by Smith, Cohen with other defendants in the case. Petitioners argued that the settlement proposal was "tainted" because, in view of Smith, Cohen's relationship to First National, it could not adequately represent the class. They argued that "protection of the interests of the Bank would prevent Smith, Cohen from prosecuting fully the claims

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[1] The basis for the motion to disqualify the other respondent, Barthold & McGuire, was its allegedly subservient relationship to Smith, Cohen. It was undisputed that at the time the disqualification motion was made, Barthold & McGuire had had a relationship of less than three months' duration with Smith, Cohen, limited to the instant case, in which it acted as "of counsel." This relationship involved no contact whatever with First National, direct or indirect.

of the plaintiffs against the defendants" (Appendix to Petition at 12a), and that this disability would present insuperable practical and ethical problems in the *future*.[2]

The plaintiff class was given written notice of the hearing on the proposed settlements and the disqualification motion. No member of the plaintiff class voiced any objection to the respondents' continued participation in the case.

First National has never taken a position, in the District Court or on appeal, with regard to the disqualification motions.[3]

The District Court denied disqualification, permitted Smith, Cohen to withdraw from the case as against First National to remove any possible appearance of impropriety in the future, and appointed respondent Barthold & McGuire as lead counsel for the class as against First National. Petitioners attempted to appeal as of right from all of these orders. They never asked the District Court to certify that the issue involved a "controlling question of law" on which an interlocutory appeal would "materially advance the ultimate termination of the litigation," as permitted by 28 U.S.C. § 1292(b).

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[2] Petitioners also argued the adequacy of class representation issue in briefs to the Fifth Circuit. They did not make that argument in their petition for rehearing.

[3] By way of background, it should be noted that Smith, Cohen did not participate in bringing First National into the case as a defendant. That was done by another law firm, in an action then unconsolidated with the action that Smith, Cohen had commenced. The actions were later consolidated and the other law firm withdrew. Thus, Smith, Cohen "acquired" the case against First National.

REASONS FOR DENYING THE PETITION

(1) There Is No Conflict Among The Circuits On The Question Presented

Petitioners base their application for a Writ upon a purported conflict among the Circuits as to whether the denial of a motion to disqualify counsel is a "final decision" within the meaning of 28 U.S.C. § 1291. That was not the issue before the Fifth Circuit. The Fifth Circuit was called upon to decide whether the denial of a motion to disqualify *class counsel* in a *class action* is a "final decision" under the statute. The class nature of this case was the explicit basis for the Fifth Circuit's opinion, and is a salient distinguishing feature which is not present in most of the cases cited as being in conflict.

Further, this case is most unusual in its factual pattern even among class actions. In this case the District Court assumed a continuing role in monitoring the behavior of class counsel to insure that no "appearance of impropriety" — such as formed the basis for the attempted disqualification in the District Court below — is permitted to infect the continuing proceedings. And, from the beginning, the District Court recognized its continuing duty to exercise supervisory control over class counsel to insure the adequacy of representation of the class. As the Fifth Circuit noted (Appendix to Petition at 6a):

> "To perform this duty, the trial court must continuously scrutinize the class attorney to see that he is adequately protecting the interest of the class. If, at any time, the trial court realizes that class counsel should be disqualified, it . . . must either

> enter orders eliminating the problem or decertify the class."

None of the Court of Appeals' cases which Petitioners cite as being in conflict have these distinguishing characteristics.

The District Court's Order clearly is not a final judgment. Consequently, it is subject to appeal of right only if it falls within that "small class" of orders deemed to be "final decisions" under the rules enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Cohen* was most recently analysed by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), in which this Court rejected the "death knell" doctrine espoused by the Second Circuit, and held that an order refusing to certify a case as a class action was not a "final decision" within the meaning of *Cohen*. In support of that holding, this Court noted:

> "To come within the 'small class' of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."

Id. at 468.

The Fifth Circuit's opinion relied heavily on *Coopers & Lybrand*, and held that the District Court's Order did not fall within the limited class of appealable non-final orders for two reasons. First, it did not "conclusively determine the disputed question" of the alleged appearance of impropriety because of the District

Court's continuing supervisory role over class counsel. Second, it was not "effectively unreviewable on appeal from final judgment." (The language quoted was taken verbatim by the Fifth Circuit from *Coopers & Lybrand.*)

No other Circuit has dealt with a class counsel disqualification motion utilizing a post-*Coopers & Lybrand* analysis.[4] Therefore, no conflict exists among the Circuits. Furthermore, only the Second and Third Circuits had decided disqualification questions in a *class action* context prior to *Coopers & Lybrand*, and their rulings can be reconciled with that of the Fifth Circuit below.

In *General Motors Corp. v. City of New York*, 501 F.2d 639 (2nd Cir. 1974), the Second Circuit held that an order refusing to disqualify class counsel was appealable under 28 U.S.C. § 1291. However, there is no indication that the Second Circuit considered the distinguishing factors relating to the selection of class counsel as opposed to individual counsel. Instead, the decision simply relied upon the Second Circuit's *en banc* decision in *Silver Chrysler Plymouth, Inc. v. Chrysler*

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[4] Two Circuits have addressed disqualification questions post-*Coopers & Lybrand* but not in a class context. The Seventh Circuit allowed an appeal in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), after *Coopers & Lybrand.* However, no Motion to Dismiss the Appeal was filed, and appealability was not a contested issue before the Seventh Circuit. The Sixth Circuit reversed its previous position in *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979), announcing that it would no longer take § 1291 appeals from unsuccessful attempts to disqualify counsel. The decision was on policy grounds, with no reference to *Coopers & Lybrand.*

Motors Corp., 496 F.2d 800 (2nd Cir. 1974), a case not involving class counsel.

There is, to say the least, a serious question as to whether the Second Circuit would follow *General Motors* on the same facts as were presented to the Fifth Circuit below. In a later case, the Second Circuit dismissed a § 1291 appeal from an order appointing class counsel, holding that a determination of the qualifications of class counsel, far from being collateral, was central to a finding of adequacy of representation. Since the question appealed was therefore not separable from the other issues in the case, it did not fall within the *Cohen* doctrine. *Cullen v. New York State Civil Service Commission*, 566 F.2d 846 (2nd Cir. 1977).

Similarly, in *Handwerger v. Ginsberg*, 519 F.2d 1339 (2nd Cir. 1975), the Second Circuit dismissed an appeal from the District Court's Order denying disqualification of plaintiff class counsel. The Second Circuit used language recognizing the unique considerations relating to disqualification of class counsel:

> "An order denying disqualification of counsel in a class action is not collateral to the main proceeding, and is not the final disposition of a claimed right, if the purported conflict of interest for which disqualification is sought is also directly relevant to the issue of propriety under FRCP 23, of the definition of the Class."

Id. at 1342.

The Second Circuit has also adopted stringent standards in reviewing unsuccessful disqualification attempts, *W. T. Grant Co. v. Haines*, 531 F.2d 671, 676-78 (2nd Cir. 1976), and has expressed unease over its

own appealability rule. *Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977). *See also Community Broadcasting of Boston, Inc. v. F.C.C.*, 546 F.2d 1022, 1027 (D.C. Cir. 1976), discussing the Second Circuit's experience.

Nor is the Third Circuit's position as clear as Petitioners indicate. Petitioners rely upon *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976), for the proposition that the Third Circuit accepts § 1291 appeals in a class context. But *Kramer* was restricted to the facts of that case. The Third Circuit cited in support of its decision the following language from a previous decision:

> "We do not hold that every ruling relating to conflict of interest by an attorney should activite the *Cohen* rule.
>
> 'Every interlocutory order involves, to some degree, a potential loss. The risks, however, must be balanced against the need for efficient federal judicial administration evidenced by the congressional prohibition of piecemeal appellate litigation. To accept (a contrary) view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters. [Citation omitted]' "

Id. at 1088 n.2.

It is apparent that the Third Circuit held that the order before it in *Kramer* was appealable not because orders disqualifying class counsel are appealable *per se*, but because the Third Circuit felt that the order in that particular case was important. Such an *ad hoc* ap-

proach to finality of orders would not today survive the Supreme Court's rejection of such appellate fact-finding missions. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473-76 (1978).

There is no conflict among the Circuits which merits the attention of this Court. Those cases not involving class counsel are irrelevant to the issues raised in this class action. The two Circuits which have accepted class counsel cases are not in conflict with the Fifth Circuit. In any event, both the Second and Third Circuits will have to re-examine their precedents in light of *Coopers & Lybrand*, as will all Circuits. Until the process of Circuit Court response to *Coopers & Lybrand* is complete, review by this Court of the Fifth Circuit's initial response would be premature.

(2) The Fifth Circuit's Decision Is Not In Conflict With *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); Rather, It Is In Accord With *Cohen* And Is A Correct Decision.

Petitioners seek to bolster their Application by arguing that the Fifth Circuit's decision is in conflict with this Court's decision in *Cohen*. Petitioners claim that the Fifth Circuit erred in holding that the District Court's Order was neither conclusive nor effectively unreviewable on appeal from a final judgment.

As to conclusiveness, Petitioners claim that a District Court has the power to disqualify individual counsel in any case, and therefore a class action order regarding class counsel is no more inconclusive than in an individual action. Petitioners are wrong. A District Court has the power to supervise the members of the

bar which practice before it, and indeed can disqualify counsel in any case. However, in class actions a District Court not only has that power but has the *obligation* to insure that class counsel not only act properly but also provide adequate representation to the members of the class. This continuing obligation on the part of the court distinguishes class actions. *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir. 1977).

Petitioners next argue that a refusal to disqualify class counsel cannot be reviewed effectively after final judgment, apparently on the grounds that reversal after final judgment will not save Petitioners the cost of defense expended in the meantime, and on the further grounds that the ethical impropriety will "fester" in the interim.

The fact that a party may have to continue to defend a case, and incur expense for doing so, because an interlocutory order is erroneous does not make that order a "final decision" for purposes of § 1291. Were that not the case, all interlocutory orders adverse to a defendant would be immediately appealable. Further, to adopt a rule which determines the finality of an order by theamount of its cost to a defendant would require the same *ad hoc* factual evaluations by Circuit Courts which led this Court to reject the "death knell" doctrine in *Coopers & Lybrand v. Livesay*, 437 U.S. 470, 474-77 (1978).

Petitioners concern for the "festering" of Smith, Cohen's "ethical impropriety" is a transparent attempt to bestow "importance" on an issue which has no significance beyond this case. It should be remembered that neither Smith, Cohen's client, First National, nor

any member of the class (after written notice), considered the alleged impropriety sufficient to complain of it, and the District Court considered limited withdrawal by Smith, Cohen a sufficient cure for any apparent impropriety. The only persons who appear aggrieved are Petitioners, whose interests are adverse to the very Plaintiff Class which they seek to "protect" by disqualifying class counsel. The evil seen by Petitioners is simply "an impropriety which exists only in the minds of imaginative lawyers." *Woods v. Covington County Bank*, 537 F.2d 804, 819 (5th Cir. 1976).

Finally, the Fifth Circuit's opinion correctly emphasized the availability of 28 U.S.C. § 1292(b) as an appellate vehicle to review interlocutory orders. Petitioners *had* recourse from the District Court's Order; they could have pursued their appeal under 28 U.S.C. § 1292(b).[5] The Fifth Circuit expressly referred to that remedy, and other Circuit Courts have voiced preference for the use of 28 U.S.C. § 1292(b) or, alternatively, mandamus under the All Writs Act, 28 U.S.C. § 1651, for appeals from orders refusing to disqualify counsel. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Community Broadcasting of Boston, Inc. v. F.C.C.*, 546 F.2d 1022 (D.C. Cir. 1976). *See also The Appealability of Orders Denying Motions for Disqualification of Counsel in Federal Courts*, 45 U. Chi. L. Rev. 450 (1978). Indeed, the Fifth Circuit simply followed the lead of this Court's

[5] The Fifth Circuit likely would have accepted the appeal. In *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978), the Fifth Circuit held that an order refusing to disqualify class counsel was unappealable under § 1291, but accepted a § 1292(b) appeal.

endorsement of § 1292(b) procedure in interlocutory situations. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978).

The availability of interlocutory appeal under 28 U.S.C. § 1292(b) or 28 U.S.C. § 1651 also answers Petitioners' argument that the Courts of Appeal must play a part in the enforcement of ethical standards. If the ethical question is truly "substantial," certification by the District Court and acceptance by the Court of Appeals will follow. In the unlikely event that the District Court refuses certification, direct access to the Court of Appeals is available under 28 U.S.C. § 1651. Even if the Court of Appeals refuses acceptance under 28 U.S.C. § 1292(b) or refuses mandamus under 28 U.S.C. § 1651, it has participated in the review process, and has determined that the ruling at issue lacks substantial importance.

In short, the Fifth Circuit's decision is in accord with *Cohen*, and is correct. The Fifth Circuit simply decided that under the facts of this case, where the District Court has assumed a continuing duty to monitor the efficiency of its order allowing limited withdrawal by Smith, Cohen, the District Court's Order was not conclusive, but was subject to review at any time. Being non-conclusive, the order is not "final" under *Cohen*. The Fifth Circuit's decision is nothing more than a strict application of *Cohen*, and is reflective of this Court's expressed concern that "indiscriminate" *Cohen* appeals would undermine the interlocutory appellate procedure created by Congress in 28 U.S.C. § 1292(b). *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Petitioners could have taken a § 1292(b) appeal, but did not. The error was theirs, not the Fifth Circuit's.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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